Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	RM No. 11203
47 C.F.R. §§ 76.64, 76.93, and 76.103	)	
	)	
Retransmission Consent, Network	)	
Non-Duplication, and Syndicated	)	
Exclusivity	)	

To: Consumer & Governmental Affairs Bureau

JOINT COMMENTS OF NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.

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I. INTRODUCTION AND SUMMARY

Multiple statutes and established Commission regulations have confirmed that local television broadcast stations must be able to claim exclusivity vis-à-vis cable operators or others who want to redistribute broadcast programming for the cable operators' own profit. The recent petition for rulemaking filed by the American Cable Association ("ACA") asks the Federal Communications Commission ("FCC" or "Commission") to ignore such overwhelming legal and policy support and rewrite the statutory retransmission consent requirement by permitting "small" cable systems to import a distant television signal if a local television station exercises its right to elect retransmission consent and requests compensation for carriage of its signal. [1] NBC Universal, Inc. and NBC Telemundo License Co. (collectively, "NBC") submit that the Petition is completely at odds with the retransmission consent and program exclusivity regimes that have been carefully crafted by Congress and the FCC to preserve free, over-the-air broadcasting for the benefit of the entire public for at least the following three reasons:

[1] Petition for Rulemaking of American Cable Ass'n (filed Mar. 2, 2005) ("Petition"). *See* FCC Public Notice, *Consumer & Governmental Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Rep. No. 2696 (Mar. 17, 2005).

- Through the Cable Consumer Protection and Competition Act of 1992, Congress established that every local station had the statutory right to seek compensation, cash or otherwise, from cable operators that may seek to redistribute a station's programming (for its own profit), just as cable operators pay cable networks for the right to redistribute national pay-TV networks.

- In a series of actions over the last 13-plus years, including recent Satellite Home Viewer legislation, Congress and the Commission not only affirmed that every station has the right to demand compensation from their cable competitors in exchange for the station's programming, but also clarified that that right applies to other forms of retransmission, such as by satellite operators. In these same proceedings, Congress and the Commission either maintained or broadened long-standing FCC exclusivity provisions designed to ensure that local stations can negotiate exclusive rights to particular content within a limited geographic zone.

- These specific mandates underscore a fundamental truth: local broadcast stations are a proven means of effectively communicating local news, weather, public affairs, and other local information to communities throughout the country. The decades-old affiliate relationship between local stations and national program providers in which the program providers have chosen to grant exclusivity to many affiliates within a limited geographic area has fostered such local service to stations' home communities, just as national-local partnerships in many other industries have shown that local exclusivity benefits the public by enabling more consumers to access better products.

ACA's basic argument that cable operators should have the right to retransmit broadcast programming without compensation to local stations has been rejected several times previously by Congress and the Commission. Without citing any credible changed circumstance as justification, ACA seeks to commandeer network programming and carry it outside of local markets by unreasonably conditioning the protections afforded to local broadcast outlets through the retransmission consent and program exclusivity rules. Essentially, ACA would compel every network affiliate to have the authority to grant retransmission consent *nationwide* with respect to network programming, thus violating privately-negotiated limits on the station's exhibition rights and undermining the program exclusivity rights of all other affiliates. The rule changes sought by ACA would require the Commission to override multiple statutes and would harm local stations, upend the level playing field Congress sought to achieve between local stations and cable programming networks, and damage the network-affiliate partnership that has enabled local network-affiliated stations to serve their local communities so successfully. Accordingly, the Petition should be summarily dismissed or denied.

II. THE INTERTWINED RETRANSMISSION CONSENT AND PROGRAM EXCLUSIVITY REGIMES CREATED AND REPEATEDLY ENDORSED BY CONGRESS AND THE FCC REMAIN ESSENTIAL TO THE STATUTORY GOALS OF PRESERVING FREE LOCAL TELEVISION STATIONS AND STIMULATING PROGRAMMING DIVERSITY

The intertwined retransmission consent and program exclusivity regimes are built on the recognition by Congress and the FCC that our statutorily-mandated system of free, over-the-air local broadcast stations can be maintained only if each program provider can control the redistribution of its programming and each station can control the redistribution of its signal, both within and beyond its local market.

A. Congress Clearly Has Maintained the Right of Broadcasters to Control the Distribution of Their Signals and Programming in the 1992 Cable Act and Satellite Home Viewer Legislation

When Congress adopted the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Congress reaffirmed the right of television broadcasters to control the distribution of their signals and programming – a right already codified in the Communications Act of 1934, as amended ("Communications Act") – by clarifying and extending existing Section 325.[2] As part of the 1992 Cable Act, Congress amended Section 325 by adding a new subsection (b) to clarify what it concluded was the original intent of the drafters of the 1934 Act: "to establish the right of broadcast stations to control the use of their signals by cable systems and other multichannel video programming distributors."[3]

As explained in the Senate Report accompanying S. 12 (which contained essentially the version of the Section 325 amendments adopted by the Conference Committee), "The Committee believes, based on the legislative history of this provision, that Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by any means. . . . The right to control retransmission and to be compensated for others' use of their signals has always been a part of broadcast regulation.

[2] Codified at 47 U.S.C. § 325(a).

[3] S. Rep. No. 102-92, at 34 (1991), accompanying S. 12, 102nd Cong. (1991) ("*Senate Report*").

S. 12 does not alter this principle."[4] The Committee emphasized that its clarification of Section 325 would not affect the availability of broadcast signals over-the-air. To the contrary, the intent of the statute was to ensure "that our system of free broadcasting remains vibrant" and is not "replaced by a system which require[s] consumers to pay for television service."[5] Therefore, "[t]he amendments to section 325 . . . close[d] a gap in the retransmission consent provisions which, in the Committee's view, was not intended by the drafters of the 1934 Act."[6]

Despite what the Committee viewed as the clear original purpose of Section 325, it felt compelled in 1992 to clarify the principle of broadcasters' control over their signals because the FCC had ruled in 1959 that cable systems need not obtain consent from broadcast stations for retransmission of their signals. The Committee acknowledged that when cable systems had few channels and were limited to functioning as relay systems to improve reception of nearby broadcast signals, this interpretation had few practical consequences and "did not unreasonably disrupt the rights that broadcasters possess in their signals."[7]

By 1992, however, the circumstances had "changed dramatically," in the words of the Committee:

> Cable systems now include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems compete with broadcasters for national and local advertising revenues. Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. [8]

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[4] *Id.*at 34, 36. Indeed, the Committee noted that during the debates on the 1927 Radio Act, Senator Dill, in discussing the provision that became Section 325, made specific reference to the use of broadcast signals by the "wired wireless," which the Committee interpreted as a reference to an early form of cable transmission of radio signals. *Id.* at 35-36.

[5] *Id.* at 36.

[6] *Id.*

[7] *Id.* at 35.

[8] *Id.*

The Committee also found that while cable operators were exploiting the free signals of television broadcasters to generate subscriber fees, they simultaneously were paying for the cable programming services they offered to their subscribers. The Committee disapproved of this imbalance and stated that "programming services which originate on a broadcast channel should not be treated differently" from cable programming services for which a cable operator is willing to pay.[9] The Committee concluded that the FCC's interpretation of Section 325 improperly allowed cable systems to use these signals without seeking the permission of the originating broadcaster or compensating the broadcaster for the value its product creates for the cable operator, which in turn created a distortion in the video marketplace that threatened the future of over-the-air broadcasting:

> Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors. [10]

The legislative history of the 1992 Cable Act also specifically endorsed the FCC's existing program exclusivity rules: "[T]he Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage [of] local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in [the Act]."[11]

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[9] *Id*.

[10] *Id.*

[11] *Id.* at 38.

Congress again endorsed the need to preserve local stations' unconditional right to control redistribution of their programming when it adopted the Satellite Home Viewer Act ("SHVA") in 1988,[12] the Satellite Home Viewer Improvement Act ("SHVIA") in 1999,[13] and the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA") in 2004.[14] SHVA reflected Congress' intent to protect the role of local broadcasters in providing free, over-the-air television by limiting satellite delivery of network affiliated stations (other than "superstations") only to those subscribers who were unable to receive over-the-air signals. SHVIA underscored the importance to consumers of the availability of local television signals in their local markets by amending both the copyright laws and the Communications Act to permit satellite carriers to retransmit local television signals directly to subscribers.[15] But Congress also respected the fundamental right of broadcasters to control the distribution of their signals by requiring satellite carriers to obtain the consent of local stations prior to retransmitting their signals to local subscribers.[16]

B. The FCC's Broadcast Program Exclusivity Rules Recognize the Need to Protect Local Broadcast Stations From the Importation of Distant Signals By Cable Systems

Like Congress, the Commission has taken affirmative steps to protect the right of a program provider to choose to enable a local station to grant consent to the secondary retransmission of the provider's programming, subject to private negotiations and specific geographic constraints. The FCC

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[12] Pub. L. No. 100-667, 102 Stat. 3949 (codified at 17 U.S.C. §§ 101 note, 111, 119, 119 notes, 501, 801, 804; 47 U.S.C. §§ 605, 612, 613).

[13] Pub. L. No. 106-113, 113 Stat. 1536, 1501A-521 (codified at 17 U.S.C. §§ 101, 111, 119, 122, 501, 510; 47 U.S.C. §§ 325, 338, 339).

[14] Pub. L. No. 108-447, 118 Stat. 2809, 3393-3431 (codified at 17 U.S.C. §§ 101note, 119 note; 47 U.S.C. §§ 307, 312, 325 note, 338 note, 340, 341).

[15] 47 U.S.C. § 338; 17 U.S.C. § 122.

[16] *See* 47 U.S.C. § 325(b)(3)(C); *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5446 (2000) ("*Good Faith Order*").

recognized the need for broadcast program exclusivity rules very soon after the transformation of cable systems from mere signal relay systems within terrain-obstructed markets to wholesale importers of distant television signals. Among the first cable rules adopted by the FCC in the mid-1960s were distant signal limitations designed to protect the exclusive exhibition rights in network and other programming for which broadcast stations had negotiated in their local markets.[17] The Commission found that the primary business of cable had shifted from delivering television signals to terrain-obstructed areas within a television station's service area to the importation of distant signals not otherwise viewable in that local market, including signals containing programming for which the local stations had bargained for and obtained exclusivity.[18] The Commission further noted that cable systems carried these signals without paying the originating stations or engaging in the type of competitive bidding process to which the stations were subjected.[19] The Commission, concluding that the unfettered importation of distant signals by cable systems constituted an unfair method of competition, explained that the distant signal rules were needed to "preserve to local stations the credit to which they are entitled – in the eyes of the advertisers and the public – for presenting programs for which they had bargained and paid in the competitive program market."[20]

More critically, however, the Commission adopted the distant signal rules because it concluded that importation of distant signals by cable systems into the service areas of local television stations threatened to "destroy or seriously degrade the service offered by a television broadcaster" and thus

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[17] *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 F.C.C. 683 (1965) ("*First Report and Order*").

[18] *Id.* ¶¶ 49-56.

[19] *Id.*

[20] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299, 5301 (1988) ("*Exclusivity Order*"), *aff'd*, *United Video, Inc. v. FCC* , 890 F.2d 1173 (D.C. Cir. 1989)

deprive the public of the benefits of the statutorily-mandated system of local broadcasting stations: "[I]f CATV operations should drive out television broadcasting service, the public as a whole would lose far more – in free service, in service to outlying areas, and in local service with local control and selection of programs – than it would gain."[21] The Supreme Court upheld the FCC's authority to adopt these rules because it concluded that the Commission could not otherwise discharge its statutory responsibility to ensure the development and maintenance of a system of free, local broadcast stations throughout the country, as required by Section 307(b) of the Communications Act.[22]

Shortly after the Supreme Court's affirmance of its authority over cable operators, the Commission adopted its first syndicated exclusivity rules authorizing stations that had bargained for the exclusive right to exhibit syndicated programming in their local markets to require cable operators to delete such programming from imported distant signals.[23] Although the FCC repealed the syndicated exclusivity rules in 1980, it reinstated a new version of the rules (while simultaneously revising and strengthening the network nonduplication rules) in 1988.[24] When it reinstated the syndicated exclusivity rules, the Commission acknowledged that in repealing the rules, it had failed to "analyze the effects on the local television market of denying broadcasters the ability to enter into contracts with enforceable exclusive exhibition rights . . . and, most importantly, the harm to viewers as a result of withholding from one group of competitors, an important and widely used tool available to others."[25]

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[21] *First Report and Order* ¶ 48; s*ee also United States v. Southwestern Cable Co.,* 392 U.S. 157, 175 (1968) ("*Southwestern Cable*").

[22] *Southwestern Cable*, 392 U.S. at 173-181.

[23] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 143, 148 (1972), *on recon.*, 36 F.C.C.2d 326 (1972).

[24] *Exclusivity Order*, 3 FCC Rcd at 5312-15.

[25] *Id.* at 5303.

Neither of the rules mandate that a station must have the exclusive right vis-à-vis a multichannel video program distributor to show particular programming in a local market; the power to grant a station exclusivity remains, at all times, within the full discretion of the program's owner or provider. However, the rules do enable a station that has successfully obtained such rights through private negotiations to enforce its exclusive right against distant signals carried by the cable operator within a limited geographic area.

In the Satellite Home Viewer Improvement Act of 1999, Congress expressly endorsed the Commission's long-standing program exclusivity rules.[26] Just four months ago, in December 2004, Congress reaffirmed the legitimate concerns with program exclusivity by authorizing the FCC to extend both the network nonduplication and syndicated exclusivity rules to SHVERA's new "significantly viewed" exception to the general prohibition on the importation of distant network signals by satellite carriers.[27] Accordingly, the FCC has concluded that Congress has directed the Commission "to ensure parity between cable operators and satellite carriers so that a station's programming that is subject to blackout deletions with respect to a cable system serving a cable community would also be subject to deletions for a satellite carrier's subscribers within the same cable community or within a satellite community."[28] This authorization includes extension to the satellite context of the "de-listing" process with respect to stations that are no longer significantly viewed so that the local station can re-assert its program exclusivity against such stations.[29]

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[26] *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688 (2000).

[27] SHVERA, Pub. L. No. 108-447, § 202, 118 Stat. at 3409 (to be codified at 47 U.S.C. § 340).

[28] *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, Notice of Proposed Rule Making, MB Docket No. 05-49, FCC 05-24 (Feb. 7, 2005).

[29] *See* H.R. Rep. No. 108-634 at 14-15 (2004).

C. ACA's Requested Relief is Flatly Inconsistent with Congressional Mandates and FCC Policies

As the foregoing discussion demonstrates, ACA's position has been addressed and rejected repeatedly in a series of legislative and regulatory actions – unbroken since 1934 – that have consistently reaffirmed the importance of maintaining a free, over-the-air television broadcast service and the critical role of broadcasters' control over their signals and their programming in achieving that statutory objective. Accordingly, ACA's proposed modifications to the FCC's rules, which would permit "small" cable systems to import a distant television signal without regard to the program exclusivity rules if the local station elected retransmission consent and requested compensation for signal carriage, must be denied.

III. RETRANSMISSION CONSENT AND LOCAL PROGRAM EXCLUSIVITY FOSTER LOCALISM – A FUNDAMENTAL CONSUMER AND PUBLIC BENEFIT – AND ARE CONSISTENT WITH LIMITED EXCLUSIVITY PROVISIONS IN OTHER ACCEPTED CONTEXTS

The American commercial broadcasting system is characterized by private sector ownership of stations assigned to local communities and charged with addressing the needs and interests of their local viewing audiences. Section 307(b) of the Communications Act directs the FCC to distribute station licenses "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[30] The objective of this focus on localism is "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern."[31] Localism is thus rooted in congressional directives to the Commission, and promoting localism in the broadcast media has been affirmed as a valid regulatory objective many times.[32]

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[30] 47 U.S.C. § 307(b).

[31] *Turner Broadcasting System v. FCC*, 512 U.S. 622, 663 (1994).

[32] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003)("*Biennial Review*") *remanded to FCC by appeal Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

Coupled with the benefits of the network-affiliate relationship, this local focus has resulted in a rich and diverse broadcast industry in which communities as small as Glendive, Montana (with 3,900 households) are served by their own television stations. Unlike other media, broadcast stations continue not to be mere passive retransmitters of programming within a specified geographic area, however. Local television stations and the people who work in them actively contribute to their communities. While much of a station's contribution to its community is derived from its programming – particularly the local news, weather, public affairs, political, and other locally oriented programming that is so important to consumers – broadcasters also contribute to their hometowns through direct community involvement and public service. The National Association of Broadcasters' monthly newsletter, "At Your Service," chronicles the vast amount of charitable and other goodwill contributions made throughout the year by local broadcast stations.[33] These activities, in turn, educate and inform station personnel about the issues of concern to their communities of license, which enables the station to be more responsive to local needs in its programming.

By eliminating the protections afforded to local broadcast outlets, ACA wants the FCC to reject any special value in local programming by denying consumers' access to critical local programming and treating distant signals as "just as good as" consumers' local stations. ACA's proposal also would risk the continuation of the benefits resulting from the national network-local station relationship that has resulted in consumers' access to higher quality and more informative content.

ACA's proposal also ignores that the right to geographic or territorial exclusivity is not unique to broadcasting. It is a property right that is a privately negotiated issue in many business relationships, including licenses of intellectual property, franchising of businesses, and other types of agreements for the distribution of products and services, and is generally considered an important pro-competitive component

[33] *See* Nat'l Ass'n of Broadcasters, *At Your Service*, available at http://www.nab.org/newsroom/issues/commserv/ays (last visited on Apr. 15, 2005).

of the relationship. For the Commission to further limit the ability of private parties to negotiate such rights without a clear directive from Congress is not just contrary to past Congressional and Commission mandates, but also to broadly accepted business practices based on sound public policy.

A. Consumers Have Access to Better News And Other Programming Because of Program Exclusivity and the Related Network-Affiliate Relationship

Congress and the FCC have been vigilant in protecting the viability of free television broadcasting through local stations because these stations have proven an effective means of communicating local news, weather, and other local information to communities across the country. Despite unprecedented competition, local stations remain leaders in delivering local information to consumers. [34] For example, NBC stations commonly owned with the NBC Network, on average, deliver more than 30 hours of local news per week to their home communities. [35] As a further example, through the recently-launched NBC Weather Plus Network, dozens of NBC affiliates have joined together to use digital technology to deliver more local programming – in particular, local weather, traffic and emergency programming of the sort that is highly valued by consumers – within a common national framework. [36] Because of enthusiastic and voluntary commitment from these NBC owned and operated stations and affiliates, all of whom want to

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[34] According to recent studies, the average television station (based on a survey of news directors) airs roughly 21 hours per week of local news. *See* 2002 RTNDA/Ball State University News Director Survey (the "RTNDA Survey"). More recently, the Commission has found that despite the rising costs of producing local news, the amount of such news offered by television broadcast stations is increasing. *See Biennial Review*, at 13664-65, 13684-85. *See also* Reply Comments of Nat'l Ass'n of Broadcasters at 5-10, MB Docket No. 04-233 (Jan. 3, 2005) (majority of commenting broadcasters aired between 25 and 40 hours of news per week) (filed in response to the Broadcast Localism, Notice of Inquiry, 19 FCC Rcd 12425 (2004) ("*Localism Notice*")).

[35] *See* Nat'l Broadcasting Co., Inc. and Telemundo Communications Group, Joint Commenters' News Programming Exhibit No. 2 (attached to Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom in the *Biennial Review* proceeding) (filed Jan. 2, 2003).

[36] *See, e.g., Localism Notice* at 12435 ("A fundamental way in which broadcasters . . . serve their communities . . . is to provide emergency information.")

deliver more, not less, local programming, the NBC Weather Plus Network expects soon to be in markets including 50 percent of the nation's television households, with more expected in coming months.

Such local programming is not produced in a vacuum. By delivering a core slate of news, entertainment and information programs to their local affiliates, broadcast networks enable local stations to devote more resources to producing locally oriented programming covering local news, weather, public affairs, and community events. Stations round out their program schedules with syndicated programming that they purchase. Thus, each local affiliate offers a unique mix of national, local, and syndicated programming that is reflective of the needs and interests of its community of license.

In addition to fostering programming diversity, the network-affiliate relationship strengthens the economic viability of local affiliates. Unlike cable systems that have two streams of revenues – subscriber fees and advertising revenues – broadcast stations must rely solely on the sale of advertising spots to generate revenue. The enhanced value of spots adjacent to network programming is key to the ability of affiliates to generate sufficient revenues to support local program production.

A critical aspect of the network-affiliate relationship is the exclusive (albeit geographically limited) right the network chooses to grant many local stations have with regard to retransmission consent of network programming within their home service area. Such exclusivity preserves the value of the local advertising on which local stations depend entirely for their revenues. Further, the right to control the re-distribution of programming produced, owned, or licensed by a network or other program distributor must remain with that distributor, both as a matter of fundamental property law and to ensure continued delivery of valuable programming to the public. In the absence of such limitations in affiliation agreements, a handful of stations, by exporting their signals outside their local markets, could undermine the value of programming for many stations and the network or program provider that pays for the programming. [37] If networks and other program producers are unable to control the distribution of their copyrighted content, the value of that programming will plummet, which will discourage further program production, thereby depriving consumers of diverse programming sources and choices. ACA's members want to ignore or even eliminate entirely a program provider's proprietary right to limit the re-distribution of its programming.

ACA's attack on broadcast exclusivity also ignores their members' accepted practice with respect to non-broadcast programming. ACA members accept without protest the proprietary right of cable networks to serve as the sole distributor of their programming nationwide. That a broadcast network chooses to distribute its programming to stations that will distribute that programming for free to over-the-air consumers as well as to cable systems cannot alter the identical right of the program provider to limit how and where the station can agree to further commercial redistribution of such programming.

B. The Public Benefits Of Territorial Exclusivity Have Been Recognized In Many Non-Broadcasting Contexts

The right to geographic or territorial exclusivity is not unique to broadcasting. It is a property right that is a privately negotiated issue in many business relationships, including licenses of intellectual property, franchising of businesses, and other types of agreements for the distribution of products and services. Such exclusive territorial rights are generally considered an important pro-competitive component of the relationship. For example, the U.S. Federal Trade Commission and the U.S. Department of Justice have broadly recognized the value of most forms of territorial exclusivity in intellectual property license agreements, especially in vertical license transactions. The joint *Antitrust Guidelines for the Licensing of Intellectual Property* (1995) issued by those agencies states in part that:

[37] The fundamental property right to control out-of-market distribution of valuable content applies equally to any cable effort, including ACA's petition, to expropriate network programming from remote, non-local stations by technological or other means.

> Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by *protecting the licensee against free-riding on the licensee's* investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself.[38]

Another broad use of exclusive territories in commerce is in the field of franchising. Franchising, as a method of expanding the reach of a business and delivering goods and services to the public, has succeeded as a business model because it enables the franchisor company to achieve national distribution of its products or services and corresponding recognition of its trade name while simultaneously enabling the franchisees – frequently, local companies with fewer resources – to operate successful enterprises backed by the reputation, products, and marketing expertise of the franchisor.

Territorial exclusivity is a common and lawful feature of franchises in the United States. These grants of exclusive rights within a limited geographical area serve the public interest by avoiding intrabrand cannibalism within the served territory, which in turn increases the incentive of the franchisee to invest, improves the quality of the products and services offered by the franchisee, and therefore increases interbrand competition between different products or services.[39]

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[38] U.S. Dept. of Justice and U.S. Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.3 (Apr. 6, 1995) (emphasis added).

[39] *See generally Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (territorial restrictions upheld: "Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers," and therefore vertical territorial restrictions are judged under the rule of reason for antitrust purposes); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292 (5th Cir. 1981).

Just as in the case of franchises and other licensing and distribution relationships generally, the existing system by which program providers may choose to grant network affiliates limited geographic zones in which these affiliates can block cable operators from retransmitting network programming from distant, non-local stations increases the capability of local stations to compete on an interbrand basis with other television networks and with cable television systems themselves. Consistent with the foregoing doctrines and with the primary goals of Congress and the FCC to preserve the viability of free, over-the-air television broadcasting, this framework benefits program providers, stations, and consumers alike: programmers retain the value of their property – their unique programming – and each local affiliate has additional incentive to innovate and invest in its overall product and service offerings. In turn, these network and station efforts mean that consumers have a broader range of choices within their local communities.

ACA's proposal to eliminate program exclusivity if a local station requests compensation for its grant of retransmission consent violates these public policy and economic goals and would damage the interests of consumers. At its bottom, the ACA proposal is nothing more – or less – than an effort to "free ride" on the backs of the networks and their local stations in a manner roundly condemned as anti-competitive by both the courts and by other governmental agencies responsible for protecting and extending competition between products and services for the benefit of the public.

IV. ACA'S PETITION IDENTIFIES NO NEW OR CHANGED CIRCUMSTANCES THAT WOULD JUSTIFY ANY MODIFICATION OF THE STATUTES, RULES AND POLICIES THAT HAVE PRESERVED LOCAL BROADCASTING FOR MANY YEARS

In the 1992 Cable Act, Congress reaffirmed and strengthened the longstanding right of television broadcasters to control the distribution of their stations' signals, because the cable industry's free use of those signals had distorted the video marketplace and resulted in broadcasters subsidizing their main competitors – cable operators. Congress also found in 1992 that the cable operators should not be entitled to take and retransmit broadcast signals for free – even if those signals are the most popular content on their systems – when they are willing to pay for the cable programming services they offer to their customers.

ACA nonetheless claims that its members need the Commission to make drastic and unauthorized changes in the retransmission consent and exclusivity regimes endorsed by Congress for the exclusive benefit of its members. ACA does not justify why its members need such sweeping remedies. Although ACA claims that favorable action on its petition will benefit "small" cable operators, implying that these operators are mom-and-pop businesses that struggle financially, ACA fails to define what it means by "small cable companies." In fact, however, and as noted by the National Association of Broadcasters in its comments filed in MB Docket 05-28, many small communities are served by systems owned by very large multiple system operators.[40]

ACA claims its efforts to undermine the established structure (and the network-affiliate relationship) are justified because of three changed circumstances: 1) the television broadcast industry is more robust than in 1992; 2) television broadcast programming is more "must have" than in 1992; and 3) stations are planning to demand more compensation than before in exchange for giving their consent to enable the stations' cable competitors to redistribute the station's programming (to the extent, of course, that the station has the right to agree to such consent with respect to particular programming). None of these changed circumstances are credible, and none justify the sweeping remedies proposed by ACA here.

As to the first point, numerous studies agree that television broadcast viewership and position vis-à-vis cable has been in steady decline.[41] Ever-increasing cable capacity has delivered more program competition to the marketplace, while fewer stations than might have been expected in 1992 have received

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[40] *See* Comments of the Nat'l Ass'n of Broadcasters at 12, MB Docket No. 05-28 (Mar. 1, 2005).

[41] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, FC 05-13, ¶ 77 (Feb. 5, 2005).

any counterbalancing compensation from cable operators that are re-selling and profiting from these stations' programming. Moreover, while the number of cable programming networks has steadily increased, giving cable operators access to literally hundreds of channels of programming, television broadcasters are still limited to one or, at most, two, outlets in each market.

As to the second point, broadcast programming has always been popular – that does not make it, as a legal matter – "must have" programming. Just last year, the FCC rejected such assertions, reporting to Congress that the statutory retransmission consent framework is working as intended, and no further remedy is needed to protect those who want to redistribute local television stations for their own profit.[42]

Moreover, ACA's own actions demonstrate that this programming does not afford local stations' market power. ACA's members are willing to pay for valuable cable programming services, such as HBO and ESPN, which compete with local stations for viewers. And despite rising prices for cable programming services, cable operators have continued to pay for and offer these cable network services.[43] Yet, ACA objects to the notion that local stations might seek subscriber fees in the next round of must-carry/retransmission consent elections.

ACA tries to bolster its argument that the Commission should dismantle the retransmission consent/program exclusivity regime by quoting, selectively and out of context, excerpts from the Commission's decision approving the acquisition of DIRECTV by News Corp. and imposing certain limited conditions on News Corp. with regard to retransmission.[44] ACA insinuates that the unique circumstances present in that case somehow characterize all broadcasters and ignores completely the one pivotal fact

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[42] *See* Media Bureau, FCC, *Report on the Packaging and Sale of Video Programming Services to the Public*, at 80 (Nov. 18, 2004).

[43] *See* GAO, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry, at 20-22, GAO-04-8, (Oct. 2003).

[44] Petition at 22-23.

cited by the FCC as the justification for the condition – the acquisition allowed News Corp. to combine its ownership of television stations and network programming with a nationwide DBS platform.[45] This unique combination of assets potentially allowed News Corp. to compete unfairly against its MVPD competitors by withholding popular programming from cable systems and thereby encouraging viewers to subscribe to DIRECTV instead. This potential abuse is simply not present in other retransmission consent negotiations. Therefore, that News Corp. accepted limited conditions with regard to retransmission as part of the approval of its acquisition of a direct multichannel video programming competitor of cable – DirecTV – offers no basis for diminishing the long-standing rights of other broadcasters.

ACA's third assertion – that ACA's members should be able to import broadcast programming for free, when they are willing to pay for dozens of cable-only services – does not justify FCC intervention, particularly when Congress has already considered and rejected this alternative. Indeed, the unwillingness of ACA's members to compensate local stations for valuable broadcast programming is precisely the inequity Congress sought to remedy when it amended Section 325 to clarify that no cable operator can retransmit the signal of a broadcast station without that station's permission. Congress expressly contemplated that some stations would bargain for cash payments for their signals while others would "negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system."[46] Regardless of the currency used, however, Congress stated its "intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals . . . [but not] to dictate the outcome of the ensuing marketplace negotiations."[47]

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[45] *See General Motors Corp. and Hughes Electronic Corp., Transferors, and The News Corp. Ltd., Transferee,* 19 FCC Rcd 473, 565 (2004).

[46] *Senate Report* at 35-36.

[47] *Id.* at 36.

That local broadcast stations finally may seek means of compensation that Congress contemplated 13 years ago does not justify FCC intervention and modification of the program exclusivity rules. To the contrary, this demonstrates the difficulty that broadcasters have experienced in attempting to achieve the competitive balance with cable operators envisioned by Congress in the 1992 Cable Act. That a cable operator may have only one source of a particular network's programming in its market does not and should not alter this competitive balance. This simply places the operator in the same bargaining position vis-à-vis the local broadcast station that it faces when negotiating with the owner of a unique cable programming service, which is exactly what Congress intended.

V. CONTRARY TO ACA'S CLAIM, THE OBLIGATION IMPOSED ON BROADCASTERS (AND CABLE OPERATORS) TO NEGOTIATE RETRANSMISSION CONSENT IN GOOD FAITH DOES NOT EXTEND BEYOND THE AREA IN WHICH THE STATION HOLDS A LICENSE FOR THE PROGRAMMING

Broadcast network affiliation and syndication agreements have long included provisions limiting the ability of local stations to consent to the redistribution of the network's or syndicator's programming beyond the stations' local markets. Such contractual provisions plainly serve the public interest because they enable local stations and national programming providers to negotiate program exclusivity within a specified geographic area. Under the Commission's rules, stations that have been granted such rights can then defend their rights vis-à-vis other re-distributors of the network or syndicated programming.

Section 325 of the Act requires broadcasters to negotiate in good faith with satellite carriers and other MVPDs with respect to their retransmission of the broadcasters' signals.[48] However, Congress did not intend this provision to prohibit a program provider from limiting later redistribution or secondary retransmission of its own programming. Therefore, the Commission's implementation of this straightforward congressional policy cannot and should not be construed as limiting a program provider's

[48] 47 U.S.C. 325(b)(3)(C).

right to restrict a station's geographical distribution of a program. In implementing the Satellite Home Viewer Improvement Act, the Commission concluded that a station could not agree to deal exclusively with one MVPD in a market to the exclusion of all others; it said nothing about the ability of a station to concede to a program provider that the program provider, not the station, had the right to agree to secondary retransmission of that programming outside of a specific geographic area.[49] Arguably, under the current interpretation of the good faith obligation, a station may not refuse to negotiate with an MVPD regarding retransmission consent with regard to programming that the station has the right to distribute in the areas served by the MVPD. Similarly, a station cannot enter into an agreement with one MVPD that prohibits the station from entering into retransmission consent with another MVPD. Neither of these provisions, however, prevents a station from refusing to grant out-of-market retransmission consent with respect to programming for which is does not possess such extra-territorial exhibition rights.

ACA's apparent interpretation of the good faith obligation to preclude such provisions in a network affiliation agreement would distort the entire retransmission consent regime beyond recognition. ACA would compel a network, syndicator, or other program owner to grant every single network affiliate the authority to grant retransmission consent *nationwide* with respect to the network's, syndicator's, or program owner's programming. Such a requirement not only would vitiate the program owner's property rights, but also would violate the territorial limits on the station's exhibition rights and undermine the program exclusivity rights of all other affiliates. Put simply, *it would enable every affiliate to become a network for purposes of cable carriage.*

Further, as the Media Bureau stated in the *Monroe Utilities Network v. Morris Network, Inc.* decision,[50] which ACA completely misconstrues, the good faith requirement applies to negotiations

[49] *See Good Faith Order*.

[50] 19 FCC Rcd 13977 (2004).

between MVPDs and broadcast stations, *not* between a network and its affiliate. In the *Monroe* case, an NBC affiliate mistakenly granted retransmission consent to a cable system located outside the station's market despite a term in the affiliation agreement prohibiting such action. The Media Bureau upheld the grant of retransmission consent because there was no dispute between the cable system and the station that consent had been given. Far from questioning the permissibility of the term in the affiliation agreement, the Bureau cautioned stations to be aware of their existing contractual obligations (such as those contained in a network affiliation agreement) that may affect their ability to negotiate a retransmission consent agreement in good faith. Further, to the extent that the station's grant of retransmission consent created a dispute with the MVPD or the network regarding the station's various contractual obligations, the Bureau expressly declined to involve itself in "arguments concerning private agreements . . . [which] are to be resolved by the parties or by courts of proper jurisdiction." The Bureau did not suggest that a contractual provision between the network and the station limiting the geographical scope of retransmission consent raised a public policy concern or ran afoul of the Commission's rules.

VI. CONCLUSION

ACA's petition should be summarily dismissed or denied because it is inconsistent with the retransmission consent and program exclusivity regimes that have been carefully crafted by Congress and the FCC to preserve free, over-the-air local broadcasting for the benefit of the public and the communities served by local stations.

Respectfully submitted,

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April 18, 2005

CERTIFICATE OF SERVICE

I, Theresa L. Rollins, do hereby certify that a copy of the foregoing "Comments of NBC Universal, Inc. and NBC Telemundo License Co." was served by U.S. mail, postage prepaid, except as otherwise noted, on this 18th day of April, 2005, on the following:

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